

CRIMINAL LAW JOURNAL

Volume 47, Number 5

2025

ARTICLES

Foreword – *The Hon Michael Kirby AC CMG*

The Hon Michael Kirby AC CMG gave a welcome address for the seminar. Drawing on his personal experiences at the Bench, Mr Kirby highlights the fallibility of our system, notwithstanding the best intentions of those working in it for it to be otherwise. Recognising this makes reforms to the system – both legislative and institutional – imperative. Mr Kirby provided a perfect overview of the issues to be discussed during the seminar, and further repeated in this special edition – and that are relevant to the issues of correcting miscarriages of justice in Australia today. 549

Dreaming of a Criminal Cases Review Commission: Politics, Resourcing, Structure and Personnel – *Samuel Lane, Bibi Sangha, Bob Moles, Rhane Rego, Stephen Keim SC and Robyn Blewer*

To conclude this special edition, we highlight some of the salient points that arose from the last session of the seminar – a panel discussion led by barrister, Samuel Lane, with Associate Professor Bibi Sangha, Dr Bob Moles, Rhane Rego and Dr Robyn Blewer. The discussion covered each panellist's current experience with cases and claims of wrongful conviction, as well as possibilities for establishing Criminal Cases Review Commission/s in Australia. While panellists had different views for the way forward, all agreed that the current approach in states and territories is insufficient and more needs to be done at government levels to facilitate the correction of wrongful convictions. To improve readability of this concluding article, we have edited the transcript of the discussion. 553

Bromley v The King: Division in the High Court's Consideration of a Miscarriage of Justice Claim – *Stephen Keim SC and Samuel Lane*

In December 2023, in a 3-2 split, the High Court refused Derek Bromley's special leave application to appeal the Court of Criminal Appeal of South Australia's decision refusing permission to bring a second appeal against his 1985 murder conviction. The authors appeared for Mr Bromley in this application and provide their reflections on the High Court's decision in this article. Keim considers the majority's decision to refuse special leave and Lane discusses the minority's decision that would have granted special leave and replaced the convictions with acquittals. The whole article contains analysis and opinions shared by both authors. 559

Justice for the Wrongfully Convicted Should Not Depend on Chance: The Need for a Criminal Cases Review Commission in Australia – *The Hon Malcolm McCusker AC CVO KC*

Mr McCusker AC CVO KC recalls his involvement with three Western Australian cases (Mallard, Mickelberg and Austic). In retracing crucial aspects of each of these matters, Mr McCusker observes how in each case luck played a crucial part – bad luck leading to the wrongful conviction and good luck facilitating the exoneration. Mr McCusker makes the point that justice for the wrongfully convicted should not depend on chance and that to strengthen the system there is a need for a Criminal Cases Review Commission to take on the work that, in these cases, only happened by good fortune. 569

The Unfortunate Background to Derek Bromley's Criminal Appeal – *Dr Bob Moles*

Bob Moles is one of Australia's leading experts in wrongful convictions. In this article he traverses the controversial career of Dr Colin Manock. By all accounts, during his professional life, Dr Manock appears to have misrepresented his qualifications and engaged in malpractice. As Bob demonstrates here, the time has come for Australian governments, who drew on Manock's self-proclaimed expertise in ways that resulted in convictions, including that of Mr Derek Bromley, to re-examine this body of work and the extent to which it has resulted in many possible miscarriages of justice. This article refers to the deaths of an Aboriginal boy and of an un-named Aboriginal man. Advice was sought from Elders in the interests of justice and of the families and communities involved. 577

Australia's Criminal Appeal Rights – Heading in the Wrong Direction? – *Bibi Sangha*

Over 100 years ago, Australian jurisdictions enacted rights to criminal appeals by copying those previously established in Britain. More recently, most Australian jurisdictions have enacted rights to a second or further appeal. In doing so, they adopted the wording from provisions which had been used to allow prosecutors to retry a person after they had been acquitted. In both cases, the copying of the earlier provisions failed to take account of important differences between the context in which they were initially enacted and the context in which they were later adopted. This has led to unfortunate consequences. Britain has gradually simplified the criminal appeal provisions and established a Criminal Cases Review Commission. Australia retained the initial confusing appeal provisions and added greater complexity and variations through the adoption of the additional appeal rights. It has no review Commission. It is time for a rethink on Australian criminal appeals. 586

New South Wales Post-Conviction Review and Kathleen Folbigg's Case – *Ms Rhanee Rego*

In 2003, Kathleen Folbigg was wrongly convicted of the murder of her three children and manslaughter of her first child; she served 20 years in prison. Following failed appeals, Ms Folbigg's wrongful conviction was exacerbated by a post-conviction review system in New South Wales that is not fit for purpose. Here, the author – who acts for Kathleen Folbigg and has assisted her since 2017 – highlights less well-known facts about the case. The system of post-conviction review in New South Wales is outlined to give context to criticisms. The conclusion: Kathleen Folbigg's case should be a catalyst for reforming the post-conviction review system in New South Wales. 597